Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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NO. 78-1119

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GABRIEL A. FAZEKAS,

*Appellant,*

V.

THE UNIVERSITY OF HOUSTON, et al.,

*Appellees.*

* * *

**On Appeal From The Court of Civil Appeals For The First Supreme Judicial District of Texas**

* * *

# MOTION TO DISMISS OR AFFIRM

* * *

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# MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court, move that the final judgment of the Court of Civil Appeals for the First Judicial District of Texas be dismissed or affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

## I.

## THE STATE PROVISIONS INVOLVED AND THE NATURE OF THE CASE

### The State Provisions

Appellant complains of two provisions or regulations of the University of Houston, a state supported

institution of higher learning which are found in Faculty and Staff Handbook. One provision appeared in the 1959-1960 Faculty and Staff Handbook and reads in pertinent part:

> Termination of the employment of a Professor or an Associate Professor with tenure, except by resignation or retirement for age in accordance with regulations, should be only for good cause shown. (Note: Regulations provide that all University employees shall retire at age 70 unless invited by the Board to continue in service, and *that retirement of any employee may be requested by him or by the University between the ages of 60 and 70.* Tenure policies herein outlined are subject to this regulation.) (Emphasis supplied)

Similar language was repeated in later Handbooks until 1972 when, pursuant to Board of Regents action on November 7, 1972, the following provision appeared in the 1972 Handbook:

> Effective September, 1975, all University personnel shall retire at age 65 unless they are invited by the Board of Regents to continue in service. Invitations for continuation of a faculty member normally originate annually within the department or departments in which the faculty member holds an appointment. For the colleges which are not subdivided into departments, the invitation should originate within the college in which the faculty member holds an appointment. The retirement of University personnel may be requested by the individual prior to age 65.

Appellant asserts that the University was without authority to enact this provision which lowered the retirement age to age sixty-five.



## The Nature of the Case

Appellee University of Houston is an institution of higher learning created and supported by the State of Texas, Chapter 111, Texas Education Code; The Appropriation Act, Acts 1977, 65th Legis., Ch. 872, Art. IV, page 3064. The concept of "tenure" is not statutorily addressed and the University is free to adopt or reject a tenure policy.

Appellant was employed by the University as a faculty member on September 1, 1964. At that time, the pertinent Faculty and Staff Handbook (1959-1960 edition) contained a tenure provision which in general terms provided that a faculty member with tenure could not be terminated except for good cause. Specifically the tenure provision, which was coupled with termination and retirement policies (and which ultimately provides the complete answer to Appellant's claims), provided:

> Termination of the employment of a professor or an associate professor with tenure, except by resignation or retirement for age in accordance with regulations, should be only for good cause shown. (Note: Regulations provide that all University employees shall retire at age 70 unless invited by the Board to continue in service, and that retirement of any employee may be requested by him or by the University between the ages of 60 and 70. Tenure policies herein outlined are subject to this regulation.)

Appellant was granted tenure effective September 1, 1967, at which time the 1967 Faculty and Staff Manual was in force and provided with respect to tenure:

> After the expiration of a probationary period, faculty members are awarded tenure by the President and their service will be terminated only for adequate cause, except in the case of retirement for age, or for circumstances due to financial exigencies.

The 1967 Manual further stated with respect to retirement and tenure:

> All University employees shall retire at age 70 unless they are invited by the Board to continue in service. The retirement of any employee may be requested by him or by the University between the ages of 60 and 70. Tenure policies herein stated are subject to this regulation.

The 1969-70 and the February 1971 Faculty and Staff Manuals contained identical provisions in connection with tenure and retirement as the 1967 Manual.

The 1972 Faculty and Staff Manual included the following provisions:

> Tenured faculty members will be terminated only for adequate cause, except in the case of retirement for age, or for circumstances due to financial exigencies.

and

> Effective September 1, 1975, all faculty members shall retire at age 65 unless they are invited by the Board of Regents to continue in service. Invitations for continuation of a faculty member normally originate annually within the department or departments in which the faculty member holds an appointment. For the colleges which are not subdivided into departments, the invitation should originate within the college in which the faculty member holds an appointment. The retirement of University personnel may be requested by the individual prior to age 65.

The statement of mandatory retirement at age 65 was occasioned by the action of the Board of Regents taken at an official board meeting on November 7, 1972.



Before the rule amending the retirement age had been adopted, the desirability of the change had been explored in some detail and for some time by an Ad Hoc Committee for Revision of the Faculty and Staff Handbook and considered and endorsed by the Faculty Senate of the University.

Throughout Appellant's service with the University, he accepted and signed, at the beginning of each academic year, appointment contracts to run for one year which set out the amount of compensation and noted the appointment was:

> Subject to all rules and regulations of the University of Houston and all applicable statutes of the State of Texas.

Two such contracts were accepted after the passage of the rule reducing the retirement age to sixty-five and a third letter of appointment was accepted by written reply after the new retirement rule.

Appellant was appointed for an additional year after he reached the retirement age of sixty-five and was finally terminated following the 1976-77 academic year.

Appellant brought this action in the District Court of Harris County, Texas asserting that the reduction in the retirement age breached his contractual rights with the University of Houston and that such reduction violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The District Court rendered judgment in favor of the University and on appeal, the Texas Court of Civil Appeals, in effect, affirmed and the Supreme Court of Texas refused to review the case noting that there was no reversible error present.

## ARGUMENT

The decisions of the Texas District Court and Court of

Civil Appeals are plainly correct in rendering adverse decisions against Appellant and in unholding the reduction in retirement age by the University of Houston.

**The Contractual Aspects**

It would seem clear, in examining the facts and circumstances of Appellant's relationship with the University of Houston, that the principles of contract law, however interpreted, permit the University to reduce its mandatory retirement age as was done in this case.

Considering first the problems that face Appellant in establishing a contract with the University of Houston, it is difficult to perceive any valid, long-term contract based on the tenure concept as Appellant is urging here.

First, tenure in itself does not create an absolute vested right. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Rehor v. Case Western Reserve University*, 331 N.E.2d 416 (Ohio Sup. Ct. 1975). The conclusion, that tenure is not a contractual right, is underlined by cases which hold that tenure does not foreclose termination where an institution must reduce its faculty because of financial exigency; tenured faculty can be laid off in such situations and no cause of action for damages for the breach of an employment contract arises. See for example the decision in *Levitt v. Board of Trustees of Nebraska State Colleges*, 376 F. Supp. 945 (D.C. Neb. 1974).

Second, there appears to be no continuing consideration offered by Appellant Fazekas during his employment years inasmuch as there was no obligation on the part of Fazekas to continue his employment with the University for more than one year at a time.

However, assuming for the purposes of argument that a valid employment contract was formulated by (1)



Appellant's acceptance of the University's offer of a teaching position, (2) the pertinent Faculty and Staff Manuals, and (3) the successive, yearly letters of appointment, Appellant's claim of entitlement to teach until the age seventy must still fail.

First, and most important, the Faculty and Staff Manual provided, when Appellant first accepted his position with the University, that:

> Termination of the employment of a professor or an associate professor with tenure, except by resignation or retirement for age in accordance with regulations, should be only for good cause shown. (Note: Regulations provide that *all University employees shall retire at age 70* unless invited by the Board to continue in service, *and that retirement of any employee may be requested* by him or *by the University between the ages of 60 and 70. Tenure policies herein outlined are subject to this regulation.*) (Emphasis supplied)

Notice is made that tenure is subject to the retirement provision and that the University can request early retirement at any age from 60 up. Under Appellant's contract theory which embodies the Manuals, the contract so urged, expressly provides for the University's reducing the mandatory retirement age to 65, a request to all faculty members to retire at age 65.

At the time Appellant received tenure, the retirement provision read as follows:

> All University employees shall retire at age 70 unless they are invited by the Board to continue in service. *The retirement of any employee may be requested* by him or *by the University between the ages of 60 and 70. Tenure policies herein stated are subject to this regulation.* (Emphasis added)

This identical provision was repeated in Faculty and Staff Manuals until 1972 when the language was altered to reflect the lowering of the mandatory retirement age.

Second, from Appellant's earliest employment until the last year of his service, he accepted faculty appointments which contained the caveat that the appointment was:

> Subject to all rules and regulations of the University of Houston and applicable statutes of the State of Texas.

In addition to the rules which permitted the establishment of a mandatory retirement at any age between 60 and 70, Appellant's employment was subject to Article 6252-14, V.T.C.S. (enacted in 1963) which exempts "institutions of higher learning with established retirement programs" from the general prohibition against requiring retirement at any age under 65 years by state agencies.

Under all theories of contract law, Appellant was contractually bound by University rule and state statute to the circumstance that the University could lower its retirement age to *60 years of age.* (A reduction of the retirement age to 60 would also be permissible under the federal age discrimination statutes since the University had a valid retirement program in effect before the application of the federal acts. See *United Airlines v. McMann*, 434 U.S. 192 (1977).[1]

[1]It should further be noted personal service contracts with the State do not partake of the same characteristics as employment contracts in the private sector. No personal service contract with the State can enjoy a protected term of longer than the period between legislative sessions. *Dodge v. Board of Education*, 302 U.S. 74 (1937); *City of Dallas v. Trammell*, 101 S.W.2d 1009 (Tex. Sup. Ct. 1937).



To summarize the urged "contract" argument, Appellant must rely on the Faculty and Staff Manuals to avoid having employment contracts which merely run from year to year. When the Manuals are unincorporated into the "contract", there is express contractual authority for the University of Houston to fix the mandatory retirement age of Appellant and all other University personnel at the age sixty-five. Appellant's contentions must fail.

**The Equal Protection Aspects**

Although Appellee contends that the contract or contracts under which Appellant was employed included provisions explicitly permitting a contractual termination when Appellant reached the age of sixty-five, it is equally clear that there has been no equal protection violation.

This Court has held that the right to work is not a fundamental right and that age is not a suspect classification and that any state classification in these respects need only be examined to determine if there is a rational basis for the classifications. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). Here the articulated basis upon which the University of Houston based its decision to set retirement at the age of sixty-five was, and is, an attempt to mold a younger, more vigorous faculty.[2]

[2]Appellant is incorrect in observing in his jurisdictional statement that the rationale, a younger, more vigorous faculty, was articulated for the first time in Defendants' trial pleadings. This basis was referred to in the deposition of Dr. Phillip Hoffman, President of the University of Houston (a part of the record in this case) and was apparently the focal point of discussion by the Faculty Committee and Faculty Senate which recommended the retirement age change prior to adoption by the Board of Regents in 1972.

This goal implicitly recognizes that the portals to a career in higher education must remain open if there is to be an ongoing market of available, academic talent.[3] It matters not whether the purpose of the University in building a more vigorous faculty could have been accomplished by a better scheme plan or device than the decision taken - the lowering of the mandatory retirement age; so long as the plan adopted has a rational basis for the realization of the goal considered desirable, the decision will not fall or fail for equal protection reasons. *Massachusetts Board of Retirement v. Murgia, supra.*

Furthermore, this court did not perceive a constitutional impediment (an equal protection problem) in a compulsory retirement plan in deciding *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977). Indeed, the consequences of applying Appellant's equal protection argument to compulsory retirement systems would invalidate all mandatory retirement systems whether the retirement age be set at seventy-five, eighty-five or one hundred - since in every case, whatever the retirement age selected, those reaching retirement age are treated differently than those who are younger. And Appellant's right to work reasoning would seem to invalidate all personal service contracts calling for employment for a term of years - the contract termination date impinges on the employee's right to work.

Appellee submits that the equal protection and right to work arguments advanced by Appellant are without substance.

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[3]The Congress of the United States has apparently accepted the rationale of younger, more vigorous faculties. In enacting the 1978 Amendments to the Age Discrimination Act (P.L 95-256), Congress excepted tenured faculty members from the prohibition against compulsory retirement before the age seventy, and permits the mandatory retirement of faculty members at the age of sixty-five.



## CONCLUSION

Appellant presents no substantial questions for the decision of this Court. The judgment of the Texas Court of Civil Appeals should be dismissed, or, in the alternative, this appeal should be affirmed because the questions presented are unsubstantial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the foregoing Motion to Dismiss or Affirm was served upon Appellant by depositing same in the United States Mail, certified, return receipt requested, to Mr. Michael T. Powell, Law Offices of Sears & Burns, Two Houston

Center, Suite 823, Houston, Texas 77002, the attorney of record for Appellant, on this ___ day of February, 1979.

LONNY F. ZWIENER